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THE FEDERAL SECURITIES ACT OF 1933: REVISED REGULATION A

BY SANFORD B. HERTZ*

* The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication by any of its employees. The views expressed herein are those of the author and do not necessarily reflect the views of the Commission or of the author's colleagues upon the staff of the Commission.

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INTRODUCTION

Pursuant to Section 3(b) under the Securities Act of 1933, as currently amended,[1] the Securities and Exchange Commission is empowered to add any class of securities to the securities already exempted from the registration requirements of this Act, if the Commission finds that registration is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering.[2] From this broad power the Commission has promulgated an exemption from the registration provisions by enacting Regulation A and therefore in effect finding that the registration of such securities prior to public sale "is not necessary in the public interest." Briefly, Regulation A provides an exemption from the registration requirements of the 1933 Act for the sale of certain securities by an issuer not exceeding $300,000 in any one year. A filing of a letter of notification together with an offering circular and the use of such offering cir-

1. 15 U.S.C.A. § 77c(b). This section states that: "The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted as provided in this section, *if it finds that the enforcement of this subchapter with respect to such securities is not necessary in the public interest and for the protection of investors* by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds $300,000." (Emphasis supplied.)

2. See 15 U.S.C.A. § 77c(a) (1-11). For an article discussing the "private offering" exemption, see, Mehler, "The Securities Act of 1933: 'Private' or 'Public' Offering." 32 DICTA 359 (1955).

cular in the public sale of the securities is a condition precedent to obtaining the exemption.[3]

Recently the Commission revised Regulation A in accordance with what it felt reflected the needs of the industry and to provide for greater protection to the investing public without the necessity of filing a registration statement as required by the 1933 Act.[4] Again by the enactment of this new Regulation A, the Commission was in effect finding that the registration of such securities was not necessary in the public interest and that an exemption from such requirements did adequately protect the investing public.

The purpose of this article will be to discuss and analyze this revised Regulation A with a view to pointing up the substantial changes from the previous regulation and to discuss briefly the application of this regulation. It should also be noted in passing that no attempt will be made to discuss fully all of the terms and conditions of Regulation A, but emphasis will be on only the changes promulgated by its recent revision.[5] Of course, an inherent defect in such an analysis at this early stage is that all of our discussions and views will be conjectural since it is impossible at this point to determine how the Commission or a court of law will interpret this new regulation. With this difficulty in mind, we shall immediately proceed to our study of this revised regulation.

AVAILABLILITY OF THE REGULATION

The new Regulation, as did the prior one, denies the availability of the exemption for the securities of any issuer if such issuer, any of its predecessors[6] or any affiliated issuer[7] has filed a registration statement which is the subject of any proceeding or examination under Section 8 of the Securities Act of 1933, as amended,[8] or is the subject of any refusal order or stop order entered into by virtue of this section within five years prior to the filing required by Regulation A; is subject to any proceedings under Rule 261 of Regulation A[9] entered within five years prior to the filing; has been convicted within five years prior to the filing of any crime or offense involving the purchase or sale of securities; is subject to any order, judgment or decree of any court entered within five years prior to the filing temporarily or permanently restraining or enjoining such person from engaging in or continuing any conduct or practice in connection with the purchase or sale of securities; or is subject to a United States Post Office fraud order.[10]

The new revised regulation, however, adds a more stringent qualification to the availability of the exemption by providing that no exemption will be available under Regulation A if any of the is-

3. For a general discussion of this exemption, see, LOSS, SECURITIES REGULATION, 380 (1951).
4. See Securities Act of 1933, Release No. 3663.
5. For an article on Regulation A before the recent revision, see, Krakover & Mehler, "Some Aspects of The Securities Regulation Law: Regulation 'A' and its Revision," 32 DICTA 71 (1955).
6. Predecessor is defined in the revised regulation in Rule 251 as ". . .(i) a person the major portion of whose assets have been acquired directly or indirectly by the issuer, or (ii) a person from which the issuer acquired directly or indirectly the major portion of its assets."
7. Affiliate is defined in the revised regulation in Rule 251 as ". . . a person controlling, controlled by, or under common control with such issuer. An individual who controls an issuer is also an affiliate of such issuer."
8. 15 U.S.C.A. § 77h (Stop order proceeding).
9. Said Rule 261 provides the various grounds upon which the Commission can suspend the exemption under Regulation A. This will be discussed in more detail infra.
10. Rule 252(c) (1) (2) (3) (4) of revised Regulation A.

suer's directors, officers or principal security holders, any of its promoters presently connected with it in any capacity, *any* underwriter of the securities to be offered, or any partner, director or officer of any such underwriter has been convicted, within *ten years* prior to the filing, of any crime or offense involving the purchase or sale of any security or arising out of such person's conduct as an underwriter, broker, dealer or investment adviser.[11] The previous regulation authorized only a five-year search of the records to determine whether any of the aforementioned class of persons had been convicted, while the new regulation authorizes a ten-year search of such records. Further, the old regulation spoke only in terms of the *principal* underwriter of the issuer, while the new regulation states that *any* underwriter may be examined to determine if any facts exist which will prohibit the availability of the exemption to the issuer. Thus, because of this, the Commission is given broader authority to scrutinize all members of the principal underwriter's selling group in order to permit the exemption to only those issuers whose associates have not been tinted with any convictions involving security violations.

The new revised regulation goes still further with respect to its examination of whether any of the issuer's directors, officers or principal security holders, any of its promoters, any underwriter or any partner, director or officer of any such underwriter is subject to any order, judgment or decree of any court temporarily or permanently enjoining such person from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or arising out of such person's conduct as an underwriter, broker, dealer or investment adviser, or is subject to an order of the Commission entered pursuant to Section 15(b) of the Securities Exchange Act of 1934;[12] or is subject to an order of the Commission entered pursuant to Section 203(d) or (e) of the Investment Ad-

11. Rule 252(d) (1) of revised Regulation A.

12. 15 U.S.C.A. § 780(b). This section in essence and in part permits the Commission to deny or revoke the registration of any broker or dealer if it finds that such broker or dealer filed any willfully false statements with the Commission and that it is in the public interest to so revoke; or has been convicted within ten years preceding the filing of any felony or misdemeanor involving security transactions; or is permanently or temporarily enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security; or has willfully violated any of the provisions of the Securities Act of 1933, as amended, or the Securities Exchange Act of 1934, as amended.

visers Act of 1940;[13] has been and is suspended or expelled from membership in a national or provincial securities dealers association or a national securities exchange or a Canadian securities exchange; or is subject to a United States Post Office fraud order.[14] The Commission not only eliminated the five-year limitation of the prior regulation but it set no time limitation with respect to a search of the record to ascertain whether any or all of the above persons were subject to any or all of the above disabilities. Thus, for example, if any of the above persons are presently subject to an injunction entered by a court at any time, the exemption would not be available.

The revised regulation again goes one step further than the old one in denying the availability of the exemption for the securities of any issuer if any underwriter of such securities, or any director, officer or partner of any such underwriter was or was named as an underwriter of any securities covered by any registration statement which is the subject of any proceeding or examination under Section 8 of the 1933 Act[15] or is the subject of any refusal order or stop order entered thereunder within five years prior to the filing for the Regulation A exemption; or covered by any filing subject to any proceeding under the Commission's powers and authorities to suspend the Regulation A exemption.[16] This is an additional conditional requirement to the availability of the Regulation A exemption which was absent in the prior regulation.

All of the foregoing conditions may in effect be waived and inapplicable if the Commission determines that it is not necessary or appropriate in the public interest or for the protection of investors that the exemption be denied because of the failure to meet these conditions.[17] Thus is left open a broad power to mitigate under circumstances which do not necessitate a strict compliance with these conditions.

The new regulation also consolidates Regulation D with Regulation A, the former applicable to only security offerings of Canadian companies. Now companies of both the United States and Canada can utilize the exemption provided by Regulation A if, in fact, such offerings meet all of the other terms and conditions of the Regulation A exemption.[18] This consolidation should bring about a consistent administrative policy applicable to both Canadian and United States companies and make administration of the regulation a more efficient process.

SPECIAL REQUIREMENTS FOR CERTAIN OFFERINGS

Perhaps the most significant change found in the new regulation is the special requirements which apply to offerings made by an issuer when such issuer was (1) incorporated or organized

13. 15 U.S.C.A. § 80b(d) (e). This section in essence and in part permits the Commission after appropriate hearing to deny or revoke the registration of any applicant under the Investment Company Act.

14. Revised Regulation A, Rule 252(d) (1) (2) (3) (4).

15. See note 8 supra.

16. Revised Regulation A, Rule 252(e) (1) (2).

17. Revised Regulation A, Rule 252(f).

18. Revised Regulation A, Rule 252.

within one year prior to the date of filing for the Regulation A exemption and has not had a net income from operations within that year; or when (2) such issuer was incorporated or organized more than one year prior to the date of such filing and has not had a net income from operations, *of the character in which the issuer intends to engage,* for at least one of the last two fiscal years.[19] The italicized portion would indicate that a business association, for example, which has had net income from its manufacturing operations would still be subject to this rule if it intended to engage in a mining venture and did not have net income from such venture. Thus, if any of the foregoing conditions are present, the special requirements of Rule 253 of revised Regulation A must be met before the exemption would be available. We now turn to a specific examination of these requirements.

One provision which did not appear in the prior regulation states in essence that if the issuer conducts its principal business operations in Canada, the securities must be qualified or made eligible for public sale under the laws of Canada and specifically in the Province in which such operations are to be conducted.[20] Thus, if an issuer was subject to this rule and was for any reason unable to qualify its securities for sale in such Province, the exemption provided by Regulation A would not be available.

Rule 254 of revised Regulation A adopts the same language

19. Revised Regulation A, Rule 253(a) (1) (2).
20. Revised Regulation A, Rule 253(b).

as did Rule 217 under the prior regulation with respect to the monetary limitation of $300,000 to be offered by an issuer, its predecessors and all of its affiliates within one year prior to the commencement of the proposed offering. However, when the securities to be offered are within the scope of those which must comply with the special requirements of Rule 253, in computing the amount of the securities which may be offered there must be included, in addition to the securities specified in Rule 254, all securities issued prior to the filing or proposed to be issued subsequent to the filing for a consideration consisting in whole or in part of assets or services and held by the person to whom issued, and all securities issued to and held by or proposed to be issued, pursuant to options or otherwise, to any director, officer or promoter of the issuer, or to any underwriter, dealer or security salesman connected with the issuer.[21] Thus, if options are granted to the underwriter of the issuer, the underlying shares which might be obtained by the exercise of the option must be included within the $300,000 computation and must be qualified under the filing for the Regulation A exemption. For example, if an issuer purported to offer $300,000 in securities and did not cover such shares subject to option rights in the letter of notification, it would appear that the monetary amount of $300,000 would be exceeded and that, therefore, the terms and conditions of the exemption would not be met and thus the exemption would not be available for the securities which might be publicly sold.

However, a proviso to this requirement permits that these additional securities or options need not be included within the $300,000 monetary limitation imposed by Regulation A if provision is made, by escrow arrangements or otherwise, to assure that none of such securities or any interest therein will be reoffered to the public within one year after the commencement of the offering and that any such reoffering will be made in accordance with the provisions of the 1933 Act.[22] It would appear that the most satisfactory method of meeting this requirement would be to provide for an escrow arrangement wherein the securities would be held for the prescribed period of time by an independent agent. In such event, a statement should be included in the escrow agreement itself and the offering circular that there will be no assignment or other disposition of any interest in the escrowed shares during the prescribed period.[23]

In addition to the foregoing requirements, any securities which are subject to this rule may not be offered for the account of any

21. Revised Regulation A, Rule 253(c) (1) (2).

22. Revised Regulation A, Rule 253(c).

23. Under the prior regulation it had been the administrative practice of requiring that any options or warrants issued by any company filing for the exemption be made non-exercisable, and the options and the underlying shares thereof be made non-assignable, non-salable, and non-transferable for a period of not less than one year from the date of the commencement of the proposed offering and until the requirements of the Securities Act of 1933 have been met. In lieu thereof, the options and underlying shares must be qualified under the filing and thus be counted in calculating the $300,000 amount prescribed by Rule 217 of the prior regulation. Query: Since the requirement to escrow the securities and the options apply to only those companies falling within the language of those which must comply with these special requirements, what of the other companies, outside the scope of these requirements? Must they still "lock in" such options, warrants and underlying shares?

person other than the issuer of such securities.[24] Thus, if an officer or director of the issuer who acquired stock in his company wished to publicly sell this stock, he must either file a registration statement with the Commission or find some other exemption from the registration provisions. He is thus deprived of the use of the exemption permitted by Regulation A.

The prior regulation permitted an issuer to file a statement pursuant to Rule 219(b) with the Commission's Regional Office in order to avail itself of the Regulation A exemption without the necessity of filing and using an offering circular, if in fact such offering did not exceed $50,000 in any one year. Rule 257 of the new regulation in essence adopts this "short form filing" for security offerings not in excess of $50,000. However, if the securities of an issuer are subject to the special requirements of Rule 253, this limited filing for small issues is not available and such a company must file and use the offering circular to avail itself of the exemption.[25]

One can quickly see from the foregoing discussion that if an issuer is within the class specified in Rule 253, there are added conditions and requirements to be met before the exemption is available. The Commission by this action has seemingly determined that more stringent requirements are necessary in new and

24. Revised Regulation A, Rule 253(d).
25. Revised Regulation A, Rule 253(e).

"untried" companies in order to better and more effectively protect the investing public.[26]

LIMITED $50,000 OFFERING

The new revised regulation, like the old, permits an issuer to offer securities in an amount not to exceed $50,000 without filing or using an offering circular.[27] As was mentioned above, this special privilege for small offerings is not available if the offerings are subject to the special requirements set forth in Rule 253.[28] This "short form" filing must contain all of the information required to be in the offering circular except the financial statements, such filing having its real value in that no offering circular need be distributed to investors prior to or concurrently with a written offer to sell the securities. In this respect the revised regulation did not change the prior one.

However, one change is evident in that the revised regulation sets forth specific limited matters which cannot be exceeded in advertising offerings made pursuant to this "short form" filing. Thus, the new regulation states that all advertisements can contain only the name of the issuer; the title of the security, amount offered, and the per-unit offering price to the public; the identity of the general type of business of the issuer; a brief statement as to

26. The Commission, however, on the same day it enacted this revised regulation, circulated for public comment a notice of proposed further amendments of Regulation A. This proposal sets forth four basic alternatives which would add further safeguards for the investing public when asked to purchase the securities of relatively new companies. The first proposal would in essence deny the availability of the exemption to the securities of any issuer where such issuer has not had net income for any one full fiscal year within the period of five years immediately preceding the date of filing for the Regulation A exemption. The second alternative would limit the amount of securities which could be offered pursuant to the exemption to 100,000 units for equity securities and 3,000 units for debt securities (bonds, debentures or other evidence of indebtedness). This second alternative would not make the distinction between companies on the basis of net income but would apply to all companies attempting to utilize Regulation A. An apparent effect of this proposal would be to reduce the dollar amounts receivable in companies offering low priced securities. The third alternative is a combination of both the first and second, making the exemption available only to issuers satisfying the net earnings test and then only for offerings of the limited amounts of securities proposed in the second alternative. The fourth alternative would limit the amount of securities which might be offered under the regulation to those issuers who could not satisfy the net earnings requirement, while those issuers which could satisfy such requirements could offer any amount of securities under the regulation so long as such amount did not exceed the $300,000 amount provided in Rule 254 of revised Regulation A. No conjecture will be made to ascertain whether the Commission will enact any of these proposed amendments, but if it should, the availability of the exemption will, of course, be predicated on compliance with these further conditions. The implication of some of these alternatives would be to deny *in toto* the exemption for small "untried" companies without net earnings. The advisability of these proposals will be left to others more able than the writer. See, Securities Act of 1933, Release No. 3664, July 23, 1956.

27. Revised Regulation A, Rule 257.

28. See supra.

the general character and location of its property; and by whom orders will be filled or from whom further information may be obtained.[29] Under the language of the old regulation if a filing was made utilizing the $50,000 rule, any type of material could be used in the attempt to sell the securities, so long as such material was not fraudulent.[30] Other than this, the new regulation did not change the nature or character of filing under the $50,000 limited offering.

SUSPENSION OF EXEMPTION

The new regulation, like the old, sets forth specific grounds which the Commission may utilize in temporarily suspending the exemption provided by the regulation.[31] However, the revised regulation gives the Commission more latitude, and thus the Commission may suspend the exemption if it has reason to believe that (1) no exemption is available under the regulation; (2) that the material filed contained a false statement of a material fact or omitted to state a material fact necessary to be stated; (3) that the offering is being made or would be made in violation of Section 17 of the Securities Act of 1933[32] (4) that any event occurred after the filing of the notification which would have rendered the exemption unavailable if it occurred prior to the filing; (5) that the issuer, any of its predecessors or any affiliated issuer was indicted for any crime involving security transactions or was enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of securities; (6) that any director, officer, principal security holder, promoter, underwriter, or any partner, director or officer of such underwriter was indicted for any crime or offense involving the purchase or sale of any security or was enjoined from engaging in or continuing any conduct in connection with the purchase or sale of any security; (7) that the issuer or anyone connected with the issuer *failed to cooperate* or has obstructed or refused to permit the making of any investigation by the Commission in connection with any offering made or proposed to be made pursuant to the Regulation A exemption. Thus, if the Commission has reason to believe that any of the foregoing are present, it may enter an order temporarily suspending the exemption provided by the regulation. These grounds now provide a broader base for the Commission to regulate a company filing under Regulation A and by administrative action remove the privilege of the exemption.

The new regulation provides that upon the entry of an order temporarily suspending the exemption, the Commission will promptly give notice to the persons on whose behalf the filing was made, that the order was entered, the reasons for the entry of the order, and that upon receipt of a written request within thirty days after entry, the Commission will within twenty days thereafter set the matter down for hearing. If, however, no hearing is requested, the order will become permanent on the thirtieth day after entry and shall remain effective until it is modified or

29. Revised Regulation A, Rule 257(b).
30. Old Regulation A, Rule 221.
31. Old Regulation A, Rule 223. Revised Regulation A, Rule 261.
32. 15 U.S.C.A. § 77q (anti-fraud section).

vacated by the Commission.[33] This provision modified the procedure of the old regulation after an order was entered in that the prior regulation had no time limitation for making a request for a hearing. Now, however, if such request is not made within thirty days, the order becomes final until vacated by the Commission's own ruling.

MISCELLANEOUS PROCEDURAL CHANGES

An issuer filing under revised Regulation A must submit to the Commission's Regional Office four copies of a letter of notification on Form 1-A at least ten days (exclusive of Saturdays, Sundays and holidays) prior to the date on which the initial offering is to be made. Such filing must be made with the Regional Office for the region in which the issuers' principal business operations are conducted or proposed to be conducted. Since the new regulation consolidates Regulation A with Regulation D, previously applicable to only Canadian companies, it further provides that if the issuer has its principal business operations in Canada, the filing must be made with the Regional Office nearest the place where the issuer's principal business operations are conducted. However, if the offering is to be made through a principal underwriter located in the United States, the filing shall be made with the Regional Office for the region in which such underwriter has its principal office.[34]

The new regulation elaborated upon the items required to be disclosed in Form 1-A. Thus, for example, the issuer must set forth the name and address of his counsel, the name and address of counsel for the underwriter, the issuer's name, date and place of incorporation or organization, and additional exhibits, such as, all instruments defining the rights of holders of debt securities, the instruments defining the rights of holders of equity securities (articles of incorporation), all underwriting contracts, a statement to the effect that the underwriter consents to be named in the offering circular as an underwriter, a statement that the accountant, engineer, geologist, appraiser, or any other person whose reports or work might appear in the offering circular has consented to the use of such material, and other exhibits which must be appended to the filing made under Regulation A.[35] No attempt has been made or will be made to fully discuss and analyze all of the disclosures required to be made by this form, but the reader's attention is specifically directed to such form and a careful study is suggested.

The new regulation provides a more complete guide for the issuer in specifying what matters should be discussed and disclosed in the offering circular. Thus, the promulgation of Schedule I, appended to the regulation, codifies many of the administrative regulations and provides the issuer with a more definite guide in the preparation of the offering circular. Again the reader's attention is directed to this Schedule, and a careful study of the material

33. Revised Regulation A, Rule 261(b).
34. Revised Regulation A, Rule 255.
35. See Form 1-A appended to Revised Regulation A.

therein included is strongly suggested before any attempt is made in drafting the offering circular.

The new regulation, like the old, provides that all sales material prepared or authorized by the issuer for use in connection with the offering of the securities should be filed with the Regional Office at least five days (exclusive of Saturdays, Sundays and holidays) prior to any use of such material.[36] The new regulation, however, specifically requires that in addition to all written material, all script of every radio or television broadcast must be filed. Thus the new regulation codifies what was left to implication in the old with respect to radio or television broadcasts.

One change which perhaps should not be grouped with the procedural changes promulgated by the new regulation since it is really a substantive matter is the requirement that if an offering is not completed within nine months from the date of the offering circular, a revised offering circular shall be prepared bringing forth all of the information required up to date.[37] The regulation goes still further in stating that in no event shall an offering circular be used which is false or misleading in the light of the circumstances then existing.[38] This requirement of amending the offering circular within a specified period of time was absent from the old regulation and under that regulation an issuer had to be on his guard to amend the material when substantial changes had

36. Revised Regulation A, Rule 258.
37. Revised Regulation A, Rule 256(e).
38. Ibid.

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taken effect which would make the use of his offering circular misleading. Of course, under the new regulation, if there is a material change in the issuer's business or position, he must amend even before the nine-month period has terminated so that his offering circular will not be false or misleading. A failure to amend within the nine-month period would permit the Commission to enter an order suspending the exemption provided by the regulation on the grounds that ". . . no exemption is available under this regulation . . . or any of the terms or conditions of this regulation have not been complied with . . ."[39] A failure to amend when there has been material changes in the issuer's business or position would permit the Commission to suspend the exemption on the grounds that ". . . the offering circular . . . contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading."[40]

The new regulation, like the old, provides that the issuer must submit a report to the Commission's Regional Office every six months so that information will be available to the investing public concerning matters such as when the offering commenced, the number of shares offered, the number of shares sold, the total amount received from such sales, the underwriting expenses and commissions paid or to be paid, a detailed itemization of the use of the funds received, the cash balance retained, and other such information outlining the progress and success of the offering.[41]

However, the issuer, under the old regulation, was obligated to submit such a report within 30 days after the end of each six-month period *following the commencement of the offering*, while the revised regulation requires the filing of such a report within thirty days after the end of each six-month period *following the date of the original offering circular or of the statement required by rule* 257 (limited $50,000 offering).[42] This change will make the administration of enforcing this requirement easier since now a specific and definite date is available to ascertain when this report is due. Under the old regulation, the Regional Office was never sure if the offering had in fact commenced, and if it did, when it had commenced.[43] The filing of this report is essential to complying with the terms and conditions of Regulation A and should be filed at the appropriate time with the Commission's Regional Office.[44]

The new regulation, unlike the old, contains a provision to the effect that if the issuer, any of its directors or officers, any person

39. Revised Regulation A, Rule 261(a) (1).
40. Revised Regulation A, Rule 261(a) (2).
41. Revised Regulation A, Rule 260. Form 2-A appended thereto.
42. Old Regulation A, Rule 224. Revised Regulation A, Rule 260.
43. Under the old regulation the Regional Office would assume that the offering commenced either on the day following the direction to the issuer of a letter waiving the waiting provisions imposed by the filing of the last amendment, or if no such request for acceleration was made to the Commission, the ten-day waiting period was calculated and it was assumed that the offering commenced on the day following the termination of this period.
44. Rule 261(c) (1) of revised Regulation A specifically allows the Commission to enter an order temporarily suspending the exemption if such report is not filed as required by Rule 260.

for whose account any of the securities are to be offered, or any underwriter of the securities to be offered, is not a resident of the United States, each non-resident shall file with the Commission a written irrevocable consent and power of attorney which designates the Securities and Exchange Commission as an agent for the purposes of accepting service of process and stipulates that any civil suit or action may be commenced by the service of such process upon the Commission in any action connected with or arising out of the filing made under Regulation A.[45] After such a filing, the Commission, any member of the investing public, or any creditor of the issuer or the selling security holder, or any other person could acquire adequate jurisdiction over a non-resident where prior to such requirement those persons may have had a right of action without an appropriate forum to bring such action. Such a requirement further implements the Commission's desire to protect the investing public.

CONCLUSION

What impact the foregoing changes will have upon offerings of securities under the new Regulation A exemption has yet to be seen. However, it seems almost certain that many of the changes promulgated by this new regulation will provide additional material for the investing public to examine before reaching the conclusion of whether to invest or not in any particular securities. From this, from the special requirements placed upon certain offerings, and from the other changes, it would appear that the new regulation will provide additional safeguards to the investing public when securities are offered or sold pursuant to an exemption provided by Regulation A. This revised regulation is further evidence of the Commission's constant scrutiny of security offerings and its effort to protect the investing public.

45. Revised Regulation A, Rule 262. The Commission has promulgated forms appended to the regulation for the purpose of complying with this rule. See Form 3-A (irrevocable appointment by individual of agent for service of process, pleadings and other papers); Form 4-A (irrevocable appointment by corporation (or other business association) of agent for service of process, pleadings and other papers); Form 5-A (certificate of resolution authorizing irrevocable appointment by corporation (or other business association) of agent for service of process, pleadings and other papers); Form 6-A (irrevocable appointment by partnership of agent for service of process, pleadings and other papers).

THE FEDERAL TORT CLAIMS ACT AND THE APPLICATION OF LOCAL LAW

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I.

INTRODUCTION

The Federal Tort Claims Act, the effective date of which was 2 August 1946, contains, as one of the most essential provisions thereof, the statement that the United States consents to liability to the same extent as a private individual under like circumstances.[1]

It would appear then, at the outset, that when an action is instituted under the terms of the Federal Tort Claims Act, that the local law will be applied to the same extent as an action in the State Courts between two private parties. However, in actions brought under the terms of the Federal Tort Claims Act the federal courts apparently are independently applying federal law and are not applying strictly the injunction that the United States consents to liability as if it were a private person. The following material indicates but a few of the fields and problems presented where this trend seems to be apparent.

II.

THE STATUTE OF LIMITATIONS

The Federal Tort Claims Act originally provided for a one year period of limitation from the time a claim accrued, or from the effective date of the Act (2 August 1946), whichever was later. This provision was amended in 1949 to provide for a two year period of limitation. When considered with the injunction contained in the Act that the United States consents to liability under circumstances in which a private party would be liable to the claimant in accordance with the law of the place, the statutory provision for limitation of actions has caused the courts some difficulty.

Periods of limitation have been described by the writers as either substantive or remedial in character. Should local periods of limitation be described as remedial, it would seem that an action based on the Federal Tort Claims Act would be governed by the limitation of the Act. However, if a state statute or period of limitation is classified as substantive—affecting the right not the remedy —it would seem that under the terms of the Federal Tort Claims Act local law should govern at least in cases where the period of

1 Tit. 28, Sec. 1346; USCA.

limitation does not exceed that prescribed in the federal law.

This approach has not been adopted by federal courts which have faced the problem. Shortly after the passage of the Federal Tort Claims Act the question was presented in a series of cases involving local wrongful death legislation. In *Burkhardt v. United States*, 165 F 2d 869, an action was brought for the benefit of the widow of Burkhardt who was killed on 2 September 1945. The action was instituted on 5 December 1946 in the United States District Court. It was dismissed because it was not instituted within the one year required by the Maryland Wrongful Death Act. On Appeal the plaintiff contended that the decision of the lower court was erroneous because the action was instituted within one year after the effective date of the Federal Tort Claims Act.

Under the law of Maryland, the one year statutory period of limitation had been described as a condition precedent to the institution of an action. The Court of Appeals reasoned that it was enjoined to look to state law for the definition of the wrong and the extent of liability, but that it is to look to the Act itself for the limitations of time. To Judge Parker it made no difference that the local limitation was held by the state courts to be a condition on the exercise of the right rather than a limitation on the remedy. "This holding is based upon the narrow ground that this limitation is imposed by statute creating the cause of action and is, to say the best of it, technical and legalistic reasoning, which is not followed in all states."

The rationale of the *Burkhardt* case was extended in *Young v. United States*, 184 F 2d 587. In this case an action was filed for a death which occurred in the District of Columbia. The local wrongful death act provided for a one year period of limitation. The deceased suffered an injury on 25 March 1948, died on 4 April 1948, and the action was filed on 9 May 1949, more than a year after the death. The action, then, ordinarily would have been barred not only under local law, but also by the period of limitation contained in the Federal Tort Claims Act. However, on 25 April 1949, the Act was reenacted and partially amended. Included in the amendments was the present period of limitations:

> "A tort claim against the United States shall be forever barred unless action is begun thereon within two years after such claim accrues or within one year after the date of the enactment of this amendatory sentence, whichever is later. . . ."

The government argued as it did in the *Burkhardt* case that because a right of action for wrongful death was not authorized at common law and is of statutory origin, the right does not survive the period of limitation contained in the statute which creates it. A majority of the Court, accepting the argument that the period of limitation was substantive, reasoned that the Federal Tort Claims Act extended the right which originally was created by the local statute. Where it provides for a longer period than is granted in the local legislation, the Federal Tort Claims Act controls as it does where the local period is longer than that contained in the Act.

The dissenting opinion fundamentally disagreed with the majority, stating that since the Federal Tort Claims Act amounts to nothing more than a waiver of sovereign immunity from suit; the two year limitation was but a maximum time in which suits could be brought against the government, and did not foreclose shorter local periods of limitation which are construed to be substantive.

The majority opinion was followed and restricted in *Moran v. United States,* 102 F. Supp. 275. In this case the Court refused to apply the *Burkhardt* decision and said that the *Young* case was applicable in those situations where Congress had created the law defining the substantive rights and therefore could extend the rights so created.

In another decision, *United States v. Westfall,* 197 F. 2d 765, an injury occurred in the State of Washington on 20 February 1946, and the action was commenced 21 April 1950 (within one year after the Federal Tort Claims Act was amended). It was contended that since the action was created by and brought under the terms of the Washington Statute, the local three year statute applied. It was held, however, that inasmuch as the action was brought within the period prescribed by the 1949 Amendment to the Federal Tort Claims Act, it was not barred by any local period of limitation. Accordingly, the reasoning of the *Moran* case was not followed and the 9th Circuit Court of Appeals applied the federal period of limitation independently of whether or not the substance of action was created by federal or state law.

There appears to be no doubt that where the local period of limitation is construed to be remedial in nature, or where the local period, regardless of its character, is longer than that contained in the Federal Tort Claims Act, the latter will govern.

If the Federal Tort Claims Act is assumed to be substantive in nature, apparently the theory of the *Young* case, applying the longer period of the Act and foreclosing shorter substantive provisions contained in local legislation, is logically supported. However, if the position of the dissent in the *Young* case is adopted, the United States should not be held liable since the Act amounts only to a waiver of immunity, and the courts are enjoined to apply local substantive law which does not conflict with the provisions of the

enabling federal legislation; the United States does not assume liability any greater than that of a private party under similar circumstances. It has been said that the legislative history supports both positions, but that practical considerations perhaps would support the majority position. By providing a longer period in which to commence actions, fewer private relief bills will be introduced to Congress.

The federal courts seem to be following the *Burkhardt-Young* line of decisions. In the case of *Foote v. Public Housing Commissioner of The United States*, 107 F. Supp. 270, the court emphasized that in an action against the United States under the Federal Tort Claims Act, the time within which the suit may be commenced should be determined by the provisions of the Act and not the state statute of limitation.

This case presented a relatively new facet of the problem. The Act provides that a claim must be submitted within two years from the time it accrues. The problem facing the court in the *Foote* case was a construction of the word "accrues." The plaintiffs occupied a dwelling unit in a public housing project for veterans at Cadillac, Michigan, which project was developed by the public housing authority and the city of Cadillac. On 14 February 1949, a coal stove in this unit exploded, resulting in the death of plaintiffs' two children on the following day.

On 21 July 1950, the probate court for Wexford County, Michi-

gan, appointed the plaintiff-father administrator of the estate of his deceased children, and on 27 July 1951, an order was entered authorizing him to institute a suit against the government. On 17 October 1951, more than two years after the death of the children, a complaint was filed alleging that the death was due to the negligence of the agents of the government. The defendant moved to dismiss on the ground that the action was barred by the period of limitation contained in the Federal Tort Claims Act.

Plaintiff contended that under the law of Michigan a claim or cause of action for wrongful death, which is a new cause of action in the personal representative of the decedent, does not accrue until the administrator is appointed. The court ruled that the claim "accrued" upon the death of the children. It decided this question as a matter of federal law, the state law to the contrary notwithstanding. In support of its conclusion, it relied heavily on the case of *Reading Company v. Koons, Administrator,* 271 US 58, in which the Supreme Court construed similar language contained in the Federal Employers' Liability Act. It also relied on *Piascik v. United States,* 65 F. Supp. 430, which construed the language contained in the Suits in Admiralty Act.

It is submitted that these cases easily are distinguishable. The Federal Employers' Liability Act deals with death or personal injury due to negligence of the employer or his agents. However, nowhere in this Act is there any injunction to apply the law of the situs as is found in the Federal Tort Claims Act. In the *Piascik* case the court construed language on the Suits in Admiralty Act, and itself relied on the decision in the *Koons* case. Because there was no requirement to follow local law, construction of the word "accrues" was properly decided as a matter of federal law. However, state decisions construing such language in state legislation involves an interpretation of local substantive law—an essential phase of the locally created cause of action, and under the Provisions of the Federal Tort Claims Act, such interpretations should be followed. It is submitted that the decision in *Foote v. Public Housing Commissioner of the United States* goes a long way from the injunction to follow local law.

The conclusion in the *Foote* case was underscored in *Bizer v. United States,* 124 F. Supp. 949 (N. D. Calif.). In this case the defendant moved for a summary judgment on the basis that the two year period of limitations had run in a malpractice suit brought under the terms of the Federal Tort Claims Act. The problem again, as emphasized by the court, was the conflict between the injunction to apply local law and the period of limitations contained in the Act. Under California law, the Statute of Limitations does not commence until the patient knows, or should know, the cause of his disability or until the doctor-patient, or hospital-patient relationship is severed. Under local law the statute had not run because of the definition of the accrual of the action. It was held, however, that the question of when the period has run is a matter of Federal law and not state law even though the latter determines the existence of the cause of action. Since under the *Foote* case, the action

"accrues" at the date of the injury, the action was barred. "If Section 2401 (b) is a real period of limitation as distinguished from a yard stick of time, it must prescribe this beginning."

Accordingly, with regard to the period of limitations to be applied, that which is set forth in the Act will apply even though the state law is interpreted by local courts to be substantive, whether shorter or longer than the period contained in the Federal Tort Claims Act. Further, even though the local substantive law defines and creates the cause of action, and as a part thereof the time when it accrues, the federal courts will independently apply "federal law" to determine the time of accrual of the action. Such an approach is difficult to follow in the light of the injunction contained in the Act itself and in light of the apparently erroneous but commonly accepted notion that there is no independent body of federal common law.

III.

Scope of Employment and Local Law

Title 28, Sec. 1346, USCA, provides in essence that the United States consents to liability under the Federal Tort Claims Act for acts of its employees acting within the scope of their office or employment under circumstances where a private person would be liable to the claimant according to the law of the place where the act or omission occurred. This principle, apparently easy to apply, has given the federal courts some trouble in at least two situations:

(1) The military personnel and their relationship to the Government.
(2) Local legislation of the "Permissive Use" variety.

The first situation has provided a source of controversy because of the fact that the soldier-government relationship is an oddity so far as state law is concerned. There would appear to be no question that if a member of the armed forces is engaged in activity which has a counterpart in civilian life, the question of whether the act or omission occurred within the scope of the employment of the soldier, could be answered by the application of local law. However, a member of the armed forces not only is an employee

as commonly defined, but he also assumes a 24 hour status relationship to the Federal Government, the counterpart of which is lacking in civilian life. It is in this latter field that the federal courts have had great difficulty in applying local law.

In the case of *U. S. vs. Campbell,* 172 Fed. 2d 500, a claim was based upon evidence that while the plaintiff was standing on the sidewalk near a railroad station, she was negligently and wrongfully collided with and knocked down by a sailor who "in line of duty" was running to board the troop train. Obviously there was no local law which dealt with "line of duty" and its impact on the doctrine of respondeat superior. The concept of "line of duty" is one which has particular reference only to governmental agencies and their relationships to their own employees. It was held in the *Campbell* case that the Government would not be liable because of the "line of duty" concept, but only if the member of the armed forces was acting within the scope of his employment such that a private party would be held liable under like circumstances.

In *Feres vs. U. S.,* 340 U. S. 135, an action was brought because of the death of a soldier during a barracks fire due to negligence. The Supreme Court held that the question of the relationship of military personnel to the Government is one strictly of federal law and that traditionally one in such a status has no claim against his superior because of negligence.

Such a notion of the application of independent federal law was applied in the case of the *United States vs. Sharpe,* 189 Fed.

2d 239 (4th Cir.) where an action was brought to recover for injuries under the Federal Tort Claims Act. A whole company was ordered to move from Fort Bragg, North Carolina, to Elgin Field, Florida. A few members of the company who owned private automobiles were given permission to drive the same independently of the convoy consisting of the remainder of the company. No specific orders were issued to the private car owners other than the date to report to destination. During the course of the journey, one of the select few was involved in an accident due to his negligence and thereafter an action was instituted against the government. It was held:

> "Attempt is made to distinguish the *Eleazer* case on the ground that the collision occurred there in North Carolina and was governed by North Carolina law. The question at issue, however, is whether Sgt. Thompson was 'acting within the scope of his office or employment' within the meaning of the statute in operating his automobile; and this involves the question of statutory construction to which the federal courts are not bound by local decision but apply their standards *** We look to the federal law and decisions to determine whether or not the person who inflicted the injury was 'an employee of the government acting within the scope of his office or employment'. We look to local law for the purpose of determining whether the act with which he is charged gives rise to liability. The Tort Claims Act adopts the local law for the purpose of defining the tort liability, and not for the purpose of determining the relationship of the government to its employees."

This group of cases would seem to indicate that if the activity of the Government employee is such that there is a counterpart in civilian life, so that there are precedents to be found, the federal courts will apply local law to determine liability. However, where no such counterpart exists, the liability of the United States will be decided on the basis of federal law. Such a conclusion would appear to be consistent with the intent of the Federal Tort Claims Act, because the Government apparently did not intend to subject itself to liability any greater than that of a private party under similar circumstances; if a private party could not be liable under such circumstances, there is no reason to suppose that the United States has consented to any other greater liability.

Another problem which has arisen under the Act is that of whether the Government consented to liability in all situations where a private party would be liable under local law. This is not the same problem as whether it will be liable in situations where a private party would not be liable, and should not be confused with the problem of being "non-civilian" activity discussed above. This problem arises out of situations where a private party ordinarily would be held liable under local law; the specific ques-

tion is whether or not the United States will also be held liable in the same fashion as a private party. The area of consideration involves recent legislation found in a number of states which is termed "Permissive Use" legislation.

The federal courts first faced such legislation in the State of California. In the case of *Long vs. United States,* 78 Fed. Supp. 35, an action was instituted by the plaintiff under the Federal Tort Claims Act because of personal injuries sustained in an automobile accident. One of the causes of action contained allegations that a civilian employee of the army was operating a government vehicle "with the permission and consent of the defendant". The Court concluded under California precedent, that the employee was not acting within the scope of his employment but was on a frolic and detour resulting in a material deviation. However, under the California "Permissive Use Law," regardless of the scope of employment, the negligence of the employee was imputable to the employer:

> "Every owner of a motor vehicle is liable and responsible for the death of, or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner, or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages." (Sec. 402, California Vehicle Code)

The court, however, refused to apply the "Permissive Use Statute" because it held:

> "Thus the lex loci delicti is in effect incorporated into the Act, enabling the Federal Courts to refer to the common law and statutes of the state or territory where the act or omission occurred in order to determine (1) what act or omission of an employee of the Government while acting within the scope of his office or employment, is negligent or wrongful."

However, where a private party will be held liable even for acts not based upon notions of respondeat superior, local law will not be applied; the Government has only consented to liability where the employee was acting within the scope of his office or employment. Liability imposed to any greater extent than this is beyond the scope of the waiver of sovereign immunity, and accordingly the federal courts cannot and will not apply the local law.

A case arising out of Minnesota provides an interesting comparison to the *Long* case. In *Clemens vs. United States,* 88 Fed. Supp. 971, the Court was faced with the Minnesota statute which provides that where a vehicle is operated

> "by a person other than the owner, with the consent of the owner, express or implied, the operator thereof shall *** be deemed to be the agent of the owner of such motor vehicle ***".

The Court ruled that although the statute broadens the field of respondeat superior, it only established the agency by prima facie evidence which could be rebutted by the defendant. Since the evidence was to the contrary and rebutted the presumption, no agency was established and the United States was held not liable.

Apparently, where liability is imputed as a matter of law, local law, as in the *Long* case, will not be applied. But where the statute is only evidentiary in character, although "broadening" the scope of respondeat superior, it will be applied by the federal courts.

IV

Conclusion

Although it is commonly stated that an action brought under the Federal Tort Claims Act will be governed by the law of the situs, there are situations where local law will not be followed by the federal courts. A few of these have been discussed above, including such questions as the Statute of Limitations, the strictly military activity, and local law which extends the common law notions of respondeat superior. These exceptions to the application of the law of the situs are growing, and it is believed that practicing lawyers who file an action against the Government for negligence, should be apprised and aware of them. In any event, it certainly is not true that under and by virtue of the Federal Tort Claims Act, the United States is now liable under the local law where a private party would also be liable under like circumstances.

Every American is Born With A Lawyer At His Side

When an American citizen is born, there's a doctor and usually a proud father on hand—besides the mother, of course. But there's another, too. A lawyer you can't see, but he's there just the same. You see, among the many rights that Americans are born with is the right to the help of a lawyer if ever accused of a crime. For those who can't afford a lawyer, the court must provide one.

This right is guaranteed us in the Bill of Rights in the Constitution. It is one way our founding fathers sought to protect Americans from the injustices that were common in their day. Injustices symbolized by the Bastille prison, the Tower of London.

Today in the Soviet sector of Berlin looms Lubianka prison. A sinister monument to present-day tyranny. Inside its dank confines crowd the victims of political injustice in our time. Men who were arrested without warrants, tried—if at all—without lawyers. Convicted on trumped-up charges.

The right to legal counsel is only *one* of our precious American rights like freedom of speech, religion and the right to own property. But if one right is denied or misused, we could lose them all. Let's know our rights. Because if we know them, we value them—and protect them.

THE PUBLIC, ITS STAKE IN JUDICIAL SELECTION

BY WILLIAM W. CROWDUS

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(From an address delivered at Law Day, University of Colorado, April 28, 1956)

Perhaps I can best emphasize the stake of the public in judicial selection by telling you something about conditions under the old judicial selection system in Missouri which led its citizens to become aroused and desire a change, what they did about the situation, and how our new system has functioned in the sixteen years since its adoption; and while I do not intend to go into the details of the Missouri Court Plan, I will emphasize some of its features in relating how it has worked, and at the same time give you a few of my comments about the shortcomings of the partisan elective system generally.

At the outset, I wish to emphasize that I do not contend the Missouri Plan is perfect, as no plan of judicial selection is perfect; but I do maintain that our Plan is a *vast improvement* over our former system. Nor do I contend that the evils under our old partisan elective method were any more pronounced under Republicans than they were under Democrats. In addition, it is not my intention to infer that we did not have *some* very excellent judges under our former system, but these good judges reached the bench not on account of that system, but in spite of it. No doubt the same situation is true in Colorado and in other states.

Sometimes things have to get worse before they get better. Dissatisfaction with the Missouri political system of selecting judges became progressively more pronounced in the 1930's and various lawyers then began to realize the futility of presenting programs that had only the backing of lawyers; and, thereupon, at the instigation of the Missouri Bar Association, there was formed a statewide organization consisting of both laymen and lawyers, under the title of Missouri Institute for the Administration of Justice. The M.I.A.J., as we have learned to call it, represented all groups and segments of people from all parts of the state. It set out upon a long range program for the improvement of the administration of justice, the most important item on its agenda being to change our mode of selecting judges.

Here are a few things which impressed upon the citizens of Missouri the need for a change in our method of judicial selection:

Under our old system no man aspiring to the bench could be at all sure of his tenure in office. He gave up his practice and, even if he made a good judge, he could not control national or state landslides, and if he happened to run for re-election on the wrong party ticket, out he would go, irrespective of his ability or fine record; or he would sometimes be "knifed" in the primary by his own political party, if any of his judicial pronouncements displeased the political bosses, and then he would have to start rebuilding his law practice, usually entailing financial loss. Hence, many of our well-qualified lawyers could not be blamed for refusing to run for a judgeship under such conditions. Under our former method of selecting judges a candidate or judge seeking re-election, whether he liked it or not, had to engage in a political campaign for an office which, in the words of Thomas Jefferson, "should be absolutely independent of politics."

It is a misnomer to say that the people elect judges in our large cities under the party elective system. In actual practice these judges are nominated and elected by a few persons holding the balance of political power, and many of the judges elected in our large metropolitan districts are not chosen so much on their qualifications, but upon their ability to appeal to the greatest number of people and often through the tricks and trading deals of the practical politician. As was stated in a report of the Special Committee on Judicial Selection and Tenure of the A.B.A.:

> "In such a contest *(direct judicial primary)* a shallow fellow of good appearance, glib tongue and affable manner has quite as good a chance of success as a John Marshall."

In other words, under the old procedure, our judicial elections, particularly in the primary, even absent the power of the political machines, at most amounted to a popularity contest with the people usually knowing nothing about the judicial qualifications of the men they were voting for as judges.

Do not misunderstand me by thinking that I am against the political system for electing men to offices that have to do with policy making, but under our system of jurisprudence, what on earth do Courts have to do with policy making? A judge in the performance of his duties is not responsible for making party poli-

cies nor for carrying them out. Policy making is purely a function of the legislative and executive branches of our government. In other words, if we want to change the social policy of our State we ought to elect a legislature to do it, to represent our political opinion. During the campaign for the adoption of the Missouri Court Plan, the Kansas City Star editorialized on this point as follows:

> "After all, what possible argument can be made for keeping the courts in politics?
>
> "No patronage is involved in a court selection. The only way a judge can do anything for his political party is through favors that would violate his oath as a judge. A man who fails in his high duty as judge can only disgrace his party.
>
> "The strong feeling that the courts must be above special interest is older than Magna Carta. Every man must be equal before the bar of justice or our whole system of justice is open to suspicion. Upon that profound sense of justice the English-speaking people have built their conceptions of human rights. And it is worth fighting for.
>
> "As a hangover from the free and easy days of American politics Missouri still chooses its judges in partisan elections. This state still subjects a judge to the muck of political campaigns. A judge is expected to rise above personal demands but he must still consider where he will find his votes in the next election. As a result many highly qualified lawyers refuse to seek judicial posts. Men elected in partisan city campaigns can usually expect to hear from the bosses, large or small, who have blocks of votes at their disposal. Obviously more than average nerve is required."

Back in the 1930's one of our St. Louis Circuit judges interceded for a notorious gangster with a long list of convictions and aided in getting him paroled from a penitentiary in a nearby state. A short time after his release this gangster was caught redhanded when he set off a bomb in a small town near St. Louis.

Another judge signed bail bonds in blank and allowed them to be used indiscriminately, at least where the "proper party" intervened, for getting people out on bond.

One political lawyer, who wielded tremendous influence with the majority of the Committeemen of the Republican Party, used to brag to his clients that he elected the Circuit judges in St. Louis and—from some of the things that occurred—I believe he was truthful in his statements.

Perhaps one of the most glaring instances of judicial incompetency under our former system concerns the story of Judge Padberg who stepped literally from the pharmacy to the bench. While employed as a pharmacist at a St. Louis hospital he was admitted to the bar in 1927. After his admission to the bar he retained his job at the hospital and worked there almost nine hours a day, six days a week and did some work at nights. He had been at the hospital 10 years when he decided to run for Circuit Judge. The records of the Circuit Clerk's office show that in the 8 years from his admission to the bar (1927) to January 1, 1935, when he took office as a judge he was listed as being the filing attorney in only 9 suits—eight for divorce and one for annulment. He became a judge, though, despite his lack of qualifications and despite his almost complete rejection by the Bar Association judicial poll (he received in this bar poll 42 votes compared to 527 for the Democrat leading the ticket) simply because he was slated by the then local political boss of his party who put him over in the Primary, and in the ensuing election where most people voted a straight ticket on account of national issues he was easily elected—it was a Democratic year. Judge Padberg's record on the bench was really a travesty on justice. He threw solvent companies into receivership without notice and, as the St. Louis Post-Dispatch commented, "Padberg's six years on the bench have been a humiliation to the law and to the city." He was in charge of a grand jury whose task was to investigate flagrant election frauds. As foreman of this jury there was an old-time politician who had a flock of relatives on the city payroll; among its other members were three with political connections. This grand jury not only failed to return indictments, but it declined to go through the motions of investigating the election frauds. Judge McAfee, a fellow judge, summarily discharged the grand jury, an unprecedented thing in St. Louis, and Judge McAfee subsequently resigned explaining he no longer desired to remain a judge under the then political system. Judge Mc-

Afee later became one of the most ardent advocates of the Missouri Court Plan.

The conditions I have pointed out naturally do not or did not apply to most rural districts to the same extent as they do or did in the great metropolitan centers. As a matter of fact, our old outright elective system as to local judges was usually satisfactory in most rural districts where, on account of sparcity of population, most of the voters knew the judicial candidates. Hence, the Missouri Plan was, therefore, made mandatory as to the Judges of the Missouri Supreme Court, and three Courts of Appeals, the Circuit and Probate Courts of the City of St. Louis and Jackson County (Kansas City) and the Courts of Criminal Correction in St. Louis and it was left optional as to the Circuit and Probate judges in the rest of the state.

Here, it is quite apropos to refer to a comment of Judge Henry T. Lummus (Chairman of the Judicial Administration Section of the American Bar Association, 1938-1939) who said:

> "A politician may make a good judge if he can stop being a politician after going on the bench; but it is a great handicap to good judicial work to have a system which tends to compel every judge to be a politician in order to remain a judge."

In 1938, Judge James M. Douglas, of the Missouri Supreme Court, who had previously been appointed by Governor Stark for an unexpired term, was a candidate for nomination in the Democratic primary. Judge Douglas, a thoroughly qualified jurist, had made an excellent record in office but had deeply offended the then Boss Tom Pendergast by voting against the latter's wishes in the famous fire insurance rate case. Pendergast, in his determination to punish Judge Douglas, picked his own candidate, a man with few judicial qualifications, to run against Douglas in the primary.

Then, the people witnessed the spectacle of a knock-down, drag-out political fight (for an office which should be completely divorced from politics) with both candidates literally stumping each of the 115 counties of the state, and with Judge Douglas devoting months of his time away from his judicial duties, at a great loss to the taxpayers. The cost of Judge Douglas' successful fight was esti-

mated at various figures between $10,000 and $25,000. Is there any wonder, therefore, that our people became disgusted with our partisan system of selecting judges and that *many eminently well-qualified lawyers would not, and could not afford to, seek judicial office under such conditions.*

The late Fred L. Williams, an eminent jurist, in a speech supporting the Missouri Court Plan, related that he was elected to a short term to the Missouri Supreme Court in 1916 because Woodrow Wilson kept us out of war, but was defeated for re-election to the bench in 1920 because Wilson did not keep us out of war.

Well, naturally our people became aroused and when they

became aroused they became united. The Missouri Legislature refused to submit for a vote of the people a Constitutional Amendment embodying the Missouri Court Plan. Our citizens then went to work in earnest under the leadership of the M.I.A.J. and really put democracy to work by getting the proposal on the ballot at the 1940 election through the initiative section of our State Constitution by obtaining approximately 100,000 signatures on petitions from all sections of the state. Here, I want to emphasize that no selfish interests were behind the Court Plan—it was adopted through the work of all factions and classes of men and women—labor, business, teachers and other professional groups, etc.,—in almost the same manner as a community as a whole supports a Community Chest or Red Cross drive.

Of course, there was some opposition to the Missouri Plan. There is, no doubt, opposition to the Colorado proposal. It is always difficult to bring people, particularly lawyers, into complete agreement on any subject. As was once said, *"If you wait for everyone to approve an idea, you will wait forever."*

This is a world of compromises and such is true of the Missouri or any other system of judicial selection. One writer described the Missouri Plan as really a compromise between the outright appointive system and the old popular elective system, adding that it retains the best features of both.

Perhaps I am getting on dangerous ground when I try to single out any one group as deserving the most credit for the successful campaign for the Missouri Court Plan, but, in my opinion, the untiring work of thousands of women of the State of Missouri was the biggest factor of all.

You will probably be amazed to learn that less than sixty days after the Amendment was proclaimed to be in effect, and before the Court Plan had even been tested, the Missouri Legislature, which had previously refused to submit the Plan for a vote of the people, passed by one vote a resolution calling for the resubmission of the question at the 1942 election. It was apparent, therefore, that the selfish politicians did not like the Plan. To me, this action proved our contention that the Plan would go a long way in taking our courts out of politics. So we had a second campaign and this time the opposition really came out in the open. Because of this fact, in some ways the second campaign was easier than the first. Our citizenry became so aroused in 1942 that the Plan was retained by almost twice the margin of votes it received at its enactment in 1940.

To clinch the fact that the citizens of Missouri like our Plan they retained it by an overwhelming vote, in our new Constitution in 1945, despite the efforts of the "Court House Ring" to take it out of the Constitution. So, the people of Missouri on three occasions, in a five-year period, approved the Plan.

The first indirect test of the Plan came a great deal sooner than most people anticipated. In 1940, at the same election at which the Court Plan was adopted, Forrest C. Donnell, a Republican, was,

on the face of official returns, elected Governor of Missouri by a majority of around 3,000 votes. His Democratic opponent contested the election, and the Legislature (which was predominated by Democrats), in apparent violation of the Missouri Constitution, refused first to seat Governor Donnell and then conduct the contest. Thereupon, the attorneys for Donnell filed in the Missouri Supreme Court a mandamus suit against the Speaker of the House of Representatives, seeking to compel him to publish the election returns seating Donnell. It so happened that all of the seven members of the Supreme Court had previously been elected as Democrats long prior to the adoption of the Missouri Plan. Nevertheless, the decision of the Court was unanimous in issuing the writ of mandamus in favor of Donnell, the Republican, against McDaniel, the Democrat. Under the old popular elective system, all of these seven members of the Court, if they sought re-election, would have first had to face the vicissitudes of a primary election and, if successful therein, then be the Democratic candidates at the ensuing general election. Under the provisions of the Court Plan, however, these judges would not have to face a primary election; and would not run as Democrats, but would, in a general election, run solely on their respective records, with no opponents, on a separate judicial ballot without party or political label, the sole issue being whether they should or should not be retained in office. Hence, when the aforesaid honest and courageous decision was rendered, these seven judges did not have to worry about party politics; *at least none of them had to make any apologies to any political leaders or committeemen.*

I state, without fear of contradiction, that thus far, in every instance but one or two, only lawyers and laymen of the highest type have been selected for the various nominating commissions, and both the public and the bar have been completely satisfied with the personnel thereof, save these several instances. *The nominating commissions are the "lifeline of the Plan." If you do not have good nominating commissions you are not apt to get good judges.* While on the subject of the nominating commissions, I also want to state, without fear of contradiction, that in every instance, with one, or possibly two, exceptions, where the appropriate nominating commission has submitted *three nominees* to the Governor *and appoint-*

ment has followed, those nominees have all been amply qualified lawyers of the caliber which would reflect credit on the judiciary. Hence, *under our experience to date, in ninety-eight percent* of the appointments, no Governor could have made a bad appointment had he been inclined to do so.

As I want to be absolutely fair in telling you how our Plan has worked, I will point out an occurrence which some people have seized upon as a criticism of our new system. Our legislature in August, 1953 created three new circuit judgeships for Jackson County; and the Governor until February, 1956, refrained from making the appointments from the nominees submitted to him and requested the nominating commission to submit other names, but the commission refused to do so on the ground that it was not compelled to under the Constitution. The Missouri Supreme Court ruled on July 23, 1954 that a nominating commission is not required to reconsider or withdraw any nominations even if a Governor so requests, but that a commission may voluntarily revise panel nominations, for cause, before the Governor has acted thereon. In any event, to end the stalemate in the Jackson County situation, the Sixteenth Circuit Nominating Commission in 1956 submitted to the Governor slightly reshuffled versions of its three original panels and Governor Donnelly, a Democrat, then appointed two Republicans and one Democrat to the three new divisions of the Jackson County Circuit Court.

Judge Nick T. Cave, Chairman of the Nominating Commission which was involved in the aforesaid dispute with the Governor, had this to say about the matter in a letter he wrote in 1954, viz:

> "It seems unfortunate that this one controversy, in fourteen years, between a commission and the governor, should be pointed out as proof positive that the Missouri Plan is a failure. One dispute does not justify the destruction of a plan which has worked so well in all other vacancies. This is evidenced by the fact that since the present controversy arose, three vacancies have been filled by the governor on the appellate courts, and two on the circuit courts. Three of those vacancies were filled by the appoint-

ment of a Republican, although our governor is a Democrat."

The *nominative and appointive features* of the Plan have been invoked on thirty-eight occasions. With the possible exception of two appointees (whose selections were criticized by some solely because of lack of experience, and not on any other grounds) both the Bar and the public have highly commended these judicial appointments, all the appointees, excepting the two just mentioned, being unquestionably well qualified for the judiciary; and one of these appointees has since developed into a very fine judge, while the other, who was appointed a little over a month ago, has not had sufficient time to have his qualifications thoroughly tested.

Some of the critics of the Plan have complained, however, that the Governors, wherever possible, have followed party lines in making the appointments. While this has been true in the majority of instances, on one occasion a Democratic Governor had no opportunity to follow party lines as all three nominees were Republicans. In any event, this criticism has pretty well faded out, because our present Governor, a Democrat, in his last 13 appointments has selected 6 Republicans, whereas he could have in all 13 cases picked a Democrat.

Moreover, as I have said, in every instance save, perhaps one or possibly two, all of the nominees have been lawyers of outstanding character and ability and every judge appointed thus far, excepting maybe the one appointed a little over a month ago (who has not had an opportunity to have his qualifications fully tested), has met our objective, which is to place high type, conscientious, able and eminently qualified lawyers on the bench. *In this connection it is also important to note that under our Plan it makes no difference what a man's politics are before he goes on the bench—the point is that once he has attained the bench he is independent of politics; he is under no obligation to his party committeeman or the politicians because they did not put him there in the first instance and he is not dependent upon them, nor is it necessary for him to incur political obligations in order to remain in office.* If a judge has a good record he is assured of a long tenure in office but if his record is bad a simple and direct method is provided for removing him.

Thus, more better qualified men have been and will be attracted to a judicial career and the public is unquestionably benefited by this system.

There have been seven tests of the elective feature of the Plan, all of which have proved that the party affiliations of judicial candidates have made no difference to the voters, since these elections have sometimes gone Republican and at other times Democratic, yet all judges, *but one,* under the Plan, have been retained in office despite their varying political affiliations. The vast majority of these retained judges had bar endorsement; *and the one removed by the voters had an extremely bad record*—he was already in office when the Plan became effective and under the terms thereof was allowed

to seek retention in office, at the expiration of his term, in the same manner as a judge appointed under the Plan.

Some lawyers have complained that the Plan freezes the incumbents in office and that it is difficult or virtually impossible to defeat a judge running for retention in office. It cannot be denied that every advantage is with the incumbent seeking retention in office. However, unless the incumbent has fallen down on the job or proven himself unfit he should be retained in office under the spirit of the Plan. As I told you, one judge has been defeated for retention in office, which refutes the aforesaid criticism. Dean Roscoe Pound once said, "Too much talk has been given to the matter of getting less qualified judges off the bench. *The real remedy is not to put them on.*" I mentioned this because of the fact that a long range view must be taken about a proposal like the one we are discussing. To illustrate this point further, when the Plan was adopted in Missouri there were 46 incumbent judges then subject thereto (now 51 judges are under the Plan) and with the 38 appointments to date, approximately 80% of said incumbents have been replaced. To date, *no judge appointed under the Plan has* been rejected or repudiated in any election or in any Bar Association poll.

Unquestionably, the prohibition in the Plan against a judge engaging in politics has had a tendency towards the making of a more independent judiciary and non-political courts and has enabled our judges to devote their entire attention to the business of their courts. The action of Honorable Leslie A. Welch, a Republican, when he was appointed Judge of the Probate Court of Jackson County (Kansas City) in 1942, is a practical demonstration of the wisdom of this provision. In the Probate office at that time ther were twenty-one employees, seventeen of whom owed their appointments to the Democratic machine; six had been Pendergast or Shannon precinct captains. Judge Welch read the constitutional provision to these employees and told them that the Probate Court should be completely divorced from party politics; that no person would be discharged or employed by his Court because he or she was a Democrat or a Republican, but that no one could retain his position if he or she held office or was an active worker in any

political organization or party. On unsigned slips, all of the employees supported Judge Welch's view and agreed to cease their political activities.

Our judges themselves like the Plan. They no longer need fear the dangers of the primary, as the primary is abolished under the Plan; *political pressure has been taken off their backs; they are prohibited from engaging in politics and from making contributions to political groups,* and the only cost to a judge seeking retention in office is a *three cent stamp to cover the sending of a notice to the Secretary of State* announcing that he desires to be a candidate for retention in office. Under our old system, the cost of being elected a Circuit Judge in St. Louis in the 1930's ran as high as $5,000, while the salary at that time was only $8,000 per annum; the salary has since been raised to $14,000.

Now a judge can devote his entire attention to the business of his Court and does not have to fear the so-called political lawyer. I regret to state that in many instances such was not the case under the old partisan system. In addition, our judges have unquestionably asserted greater independence since the Plan became effective. This is manifested by the fact that formerly our judges, in appointing receivers, etc., usually followed party lines, making their selections from lists furnished them by their party committeemen. Now it is not at all unusual for a lawyer or layman of opposite political faith to that of the judge to receive such an appointment. Under our former system, in many cases, lawyers would be selected by litigants for their supposed, if not real, influence with a certain

judge, whereas there is no longer any necessity for litigants selecting attorneys with such a thought in mind.

We now have a truly independent judiciary in Missouri and our litigants are actually receiving a higher quality of justice, and the confidence of the people has been restored in our Courts. Our Plan has encouraged men to serve on the bench who would not submit themselves to the ordeal of campaigning for office under the old political system or who lacked the means to finance such a campaign; *and we now have more highly qualified men on the bench than we had under the old system*, and this includes most of the incumbent judges at the time of the Plan's adoption, inasmuch as they no longer have to be politicians in order to remain on the bench. Further, the administration of justice has been speeded up in Missouri. From all angles the *public*, which always has the biggest stake in the courts, *has been substantially benefited by our new system.*

I have talked so much about what I think of the Missouri Plan that perhaps you would like to know what some people outside of the State of Missouri think of it. I have a brief-case full of laudatory comments about the Missouri Plan from eminent jurists, lawyers, laymen, newspapers and writers throughout the United States and, of course, I cannot begin to give you all of them. With your leave, I will mention only a few.

Mr. James Kerney, Jr., Editor of the Trenton, New Jersey, Times, in a speech in New York on September 19, 1951, before the section on Judicial Administration of the American Bar Association, stated in part, as follows:

> "* * * Barring a sizeable staff, it is virtually impossible to make a complete survey of press reaction to court administration and procedure, and judicial appointments and conduct. Working within these limitations, I have had the cooperation of 86 newspaper editors, representing a cross-section of American journalism. They have culled from their output over the past year such editorial comments, pro and con, as seemed to them worth noting.
>
> "* * * By far the largest measure of praise has been for the Missouri Plan, which is in essence the American Bar

Association's recommended objective for judicial appointments. There is continuing active support for the adoption of the Missouri Plan in Pennsylvania, Texas, Iowa, Nebraska, Kansas and Ohio. In fact, among the 86 newspapers surveyed, only one held to the emotional appeal that it was unbelievable 'the right to vote has become so degraded that the people no longer can be trusted to choose their own judges'. For the most part advocacy of the Missouri Plan has been coupled with editorial comment urging higher pay and better retirement systems for the courts."

Since organized labor has a tremendous stake in any plan of judicial selection, it is very appropriate that I quote from the comment by Frederick W. Mansfield, an eminent lawyer who has represented labor in many cases before the Supreme Judicial Court of the State of Massachusetts. Massachusetts, as you know, has never changed its system of selecting judges by appointment by the Governor with the approval of the Governor's Council, an elected body. Mr. Mansfield stated in part:

"* * * 'As one who has had some experience in the trial of so-called labor cases, I hope I may be pardoned if I venture to say a personal word of commendation and approval of the Supreme Judicial Court of Massachusetts. In this practically new and unexplored field our Supreme Court has probably penetrated further than any other civilized tribunal. In many cases it has laid down rules of law that have been and will be invaluable to organized labor. It has been most painstaking and careful, eminently *fair, and absolutely fearless.* It has lived up to the highest, *noblest* and best traditions of Massachusetts, and no greater praise can be *accorded to it.*

" 'And surely the poorest and the humblest member of society needs just such a Court—needs a fearless judiciary. He needs able, honest, and strong judges far more than his more wealthy and more fortunate neighbor. The wealthy litigant can surround himself with eminent and high-priced counsel—the poor litigant must often be content with inferior counsel, or with none, in which case he must depend entirely upon the judge. The judiciary is the best defensive bulwark of the weak against the encroachments of the strong, the powerful and the selfish.' "

Bear in mind that under the Missouri Plan the people have the final say-so as to whether an appointee shall be confirmed or rejected.

Perhaps one of the best articles ever written, which illustrates the stake of the public in judicial selection, was one by Vera Connolly, published in the January, 1950 issue of NATION'S BUSINESS entitled *"Weak Judges Weaken Your Rights"*. The title to this article itself goes on to point out that the courts of the Nation are supposed to be symbols of justice for all adding,

"that they may not be is largely our own fault". The Connolly article quotes an interview with Judge Harold R. Medina at some length, a few excerpts therefrom being:

> "* * * 'Are there many lawyers with a big practice and a large income who would be willing, as you were, to give it all up for a district judgeship?' the writer asked. (Judge Medina gave up a $100,000 a year practice for his $15,000 judicial post.)
> " 'Yes,' he said emphatically. 'There's not a man at the bar, however distinguished his position, who would not gladly accept an appointment to the bench—provided he could do so without being under any obligation. That's the important point—*no obligation*. Any lawyer would do it, no matter if he'd been earning $400,000 a year, *if he didn't have to knuckle to anyone.*
> "It's a great honor to sit on the bench,' he added thoughtfully. 'And more men are willing to serve the public decently than you realize. *But no man wants to compromise with his principles.* * * *'
> " 'What is the remedy?' Judge Medina was asked.
> " 'Get an aroused public to demand some system of appointing judges that isn't political, that's based on merit only. *Missouri*—and many other states are studying the Missouri plan—*has done just this*—in connection with her state court system. Something similar must be worked out for our federal courts.' " (Emphasis supplied)

The average citizen has a very vital stake in judicial selection. His rights, his liberties, his safety, and even his life may depend on the impartial administration of justice by the courts.

What has been accomplished in Missouri can be attained in Colorado, *if your citizens are awakened to the need for adopting the excellent proposal for a new system of judicial selection in your State and are willing to work therefor.*

Missourians have no patent or monopoly on enterprise and perseverance. But, I warn you, your campaign will not succeed through wishful thinking alone. You have a big job ahead which can be accomplished only through prodigious and organized efforts as a whole. Votes do not count, unless they are in the ballot box on election day.

"YOU, DOCTOR, WILL BE A WITNESS"

By C. JOSEPH STETLER
Director, Law Dept., American Medical Association

(The following is based upon an address given by Mr. Stetler at the Midwinter Clinical Session of the Colorado State Medical Society at Denver on February 16, 1956. The address is presented here for its value in pointing out some of the considerations which both counsel and witness should bear in mind in planning medical testimony.—Editor.)

In my work with the medical profession I have come to the realization that practically all doctors have an aversion to appearing in court and testifying in a lawsuit. Although a few have had unpleasant experiences as witnesses, most have been frightened by the exaggerated reports by a colleague of "murderous cross-examination" by an opposing counsel. For those of you who feel put upon by your role in litigation it may be some consolation to know that the Greek root or derivation of the word "witness" is "martyr."

There are, however, some basic reasons behind this aversion which deserve serious consideration. First there is a fundamental difference in the method of approach of law and medicine so far as the discovery of truth is concerned. The lawyer attempts to maintain his position by argument and contention with opposing counsel. His life is one of advocacy of causes; his object is to magnify his own arguments and to belittle those of his opponent. The physician, on the other hand, does not live by contention. His training is in the free and open atmosphere of the laboratory, hospital, sickroom or private office. He demands full and frank discussion and disclosure of all phases of a case. All factors pertaining to the case are brought to light and evaluated. When all pertinent data are collected, he correlates them and forms a judgment with reference to the illness. By training and practice, therefore, the whole tempo and attitude of the day-to-day experience of the physician and lawyer are totally different.

In addition to being unfamiliar with situations which to a lawyer are commonplace, physicians sometimes complain that they are practically made parties to the case in which they testify. It is often made to appear that the witnesses for the plaintiff are testifying against the defendant. This should not be true, of course. The witnesses should be impressed with the fact that they are testifying concerning a certain set of facts and should studiously avoid any appearance of advocacy.

Another reason for a doctor's hesitancy to act as a witness is his failure to understand the concept of examination and cross-examination. The general opinion of the average medical witness, when he takes the witness stand, and has taken an oath to tell the truth, the whole truth, and nothing but the truth, and has finished testifying, seems to be that while one attorney is trying

to bring out the truth, the one on the opposite side is trying equally hard to keep the truth from being brought before the jury and court.

The physician dislikes the time that court cases take from his daily activities—and it is not because he fears he might lose a fee. Physicians today are very busy people with morning, afternoon and sometimes all night hours. The effect of stories about doctors cooling their heels in court for hours on end while lawyers argue seemingly obscure legal technicalities is very difficult to overcome.

I believe it is unfortunate but true that the average physician's attitude toward a court appearance is summed up in a recent article by a man who is a doctor and lawyer, Sidney Shindel of Connecticut, published in the American Medical Association Journal. He said in part that:

> "To the physician, the courtroom means wasting valuable time to give a carefully restricted opinion, necessarily based on inadequate observation, for persons who cannot understand the details of the problems and who probably will not believe him anyway."

To the physician who thinks this way the "typical" trial lawyer is visualized as an oracle with a silver tongue, who delights in mortifying witnesses and who has a mysterious glamour that winds judges and juries around his finger. Fortunately this Perry Mason type of character exists almost exclusively in fiction and the movies. Physicians are amazed to find that most lawyers are quite human, with very normal reactions, such as respect for a brother profession and are apt to regard physicians as their partners in a joint venture —the administration of Justice.

Let me state then at this point that this is not all a one-sided picture. The lawyers also have their problems with the doctors. I wonder how many lawyers at some time or other have not had trouble in getting a medical report from an examining physician. Very few, if any, I'll wager. Have you ever lost a case which to you seemed to cry for justice, but which could not be won because of the lack of proper medical testimony? Have you ever had a medical witness that played "hard to get" or one who wanted an exorbitant fee? "Sure you have."

I believe that if physicians generally understood the importance

of the medical report they would not refuse it or delay in supplying it. A doctor should be impressed with the fact that the medical report is the complete basis for the preparation and trial of the medical phases of the case. While perhaps no one knows with exactness, it has been estimated that from 50 to 60 per cent of all litigation involves personal injury. Most of these cases involve serious questions of fact concerning the alleged injuries of the plaintiff or claimant. In these cases the medical report is an absolute necessity.

In this same regard, physicians who have a dread of testifying in court, and that covers the majority, should be made to realize that a complete and factual medical report will keep them out of court in 9 out of 10 legal cases. Unfortunately, some doctors do not know what should be included in a *proper* medical report. First identify the patient. Tell who gave the first aid, if any, and what it consisted of. The doctor should also reveal what his first and all subsequent examinations showed, the tests he performed, x-rays taken, the results thereof, consultations, with whom and the number, and the treatment prescribed. His prognosis, his opinion as to the final outcome and his opinion as to the causal connection, if any, between the accident or occurrence and the condition he now finds are also essential. The doctor should also show his estimated bill.

Since we all know that the things we fear most are the unknowns, I would like to suggest that the legal profession become more active in familiarizing the doctor with courtroom procedure and the do's and don'ts which should govern a medical witness. Maybe we could start out with some specific suggestions:

(1) Do not be afraid. There is no real magic about testifying. Just remember that a courtroom is a place where practical men are engaged in the serious work of endeavoring to administer justice. The honest physician who comes to court to tell the truth has nothing to fear.

(2) Don't testify unless you are satisfied that you are qualified in the area of medical care involved.

(3) Don't neglect to inform your patient's attorney of all unfavorable as well as favorable facts.

(4) Be courteous. This, of course, applies to all parties to the proceedings including the lawyers.

(5) Don't be smug. A jury is quite likely to react adversely to an attitude of this type. If you are an outstanding character or eminently well qualified, this fact will be apparent to the jury, probably through the efforts of your attorney. A modest attitude on the part of the witness is much more impressive.

(6) Tell he truth without reservation or exaggeration. This means too that a question should not be answered categorically in all instances. Often the proper answer should begin with an "if".

(7) Don't regard it is an admission of ignorance to indicate that your opinion is not conclusive. To do otherwise is frequently dishonest. Besides, candor and frankness wins respect and confidence.

(8) Don't use terminology which will not be understood by the jury, legal counsel or the judge. The role of the witness is to explain, not confuse.

(9) Don't lose your dignity. Remember that an attorney does not cease to be a gentleman because he questions you on cross-examination concerning your training, your experience, your integrity, your intelligence or even your par-

entage. If his questions are irrelevant trust the court and jury to attach little significance to them. To lose your temper and attempt to show him up will detract from your effectiveness.

We all know that neither law nor medical science is static. Both grow daily and as they grow, each supplements the other. Despite our recent amazing progress, we of both professions have much to do. The fact that we realize and appreciate that each can assist the other is perhaps the first necessary step. The medical profession comes to us with its knowledge and information. We of the law bring to medicine our problems and hopes.

If you will permit me to do so I would like to close my remarks on a lighter vein. You will recall that earlier I referred to the necessity for the use of simple language by the medical witness. The failure of a witness to do this in an actual case aroused the poetic instincts of one writer, who in verse commented upon the testimony of the physician as follows:

"With an erudite pro*fund*ity,
And subtle cogita*bund*ity,
The medical expert testifies in Court:
Explains with ponder*osity*
And keen profound verb*osity*
The intricate nature of the plaintiff's tort.

"Discoursing on pathology,
Anatomy, biology,
Opines the patient's orbit suffered thus:
Contusions of integuments
With ecchymose embellishments,
And bloody extravas*a*tion forming pus.

"A state of tumer*osity*
Producing lacrim*osity*,
Abrasion of the cuticle severe,
All diagnosed externally,
Although he feared, internally
Sclerotic inflammation might appear.

"The jury sits confused, amazed,
By all this pleonasm dazed,
Unable to conceive a single word,
All awed, they think with bated breaths
The plaintiff died a thousand deaths—
What agony, what pain he had endured.

"Said then the counsel for defense,
Devoid of garrolous eloquence,
Would I be correctly quoting you
To say his eye was black and blue?
To this the doctor meekly answered 'Yes'."

FEDERAL LOYALTY PROGRAM & PROCEDURE:

ACCUSED EMPLOYEES' RIGHT TO CONFRONT AND CROSS-EXAMINE ADVERSE WITNESSES; NECESSITY OF EVIDENCE; NECESSITY OF WITNESSES TAKING OATH

BY EVERETT ELLSWORTH SMITH

Everett E. Smith: admitted to the Minnesota bar in 1933; practised law in Minneapolis, Washington, D. C., and Kansas City; former appellate counsel in Denver for the Internal Revenue Service; former Assistant Judge Advocate of the Third Army in Europe; private practice in Denver since 1954.

The case of *Peters v. Hobby*, 349 U. S. 331, 75 S. Ct. 790 (1955), is perhaps more notable for the issues left undecided than those passed upon. Dr. John J. Peters, an eminent professor of medicine, had been for some years a special consultant in the United States Public Health Service. Compensation was at a specified rate per diem for days actually worked, i. e., from four to ten days per year when called upon by the Surgeon General. After the appropriate agency board several times had considered the question of Dr. Peters' loyalty to the Government of the United States and decided the question favorably to the employee, the Loyalty Review Board in April, 1953 decided upon its own motion to look into the matter *de novo*.

At the hearing held by a panel of the Review Board in May, 1953, the only testimony offered was that in favor of the federal employee. According to the opinion of the Supreme Court, however, the record before the Review Board also "contained information supplied by informants whose identity was not disclosed to petitioner," the employee. "The identity of one or more, but not all, of these informants was known to the Board. The information given by such informants had not been given under oath." On the record before it, the Review Board found a reasonable doubt of Dr. Peters' loyalty and purported to bar him from federal employment for three years.

In the employee's suit for a declaratory judgment holding that

his removal and debarment from employment was invalid, the District Court for the District of Columbia granted the respondent's motion for judgment on the pleadings. The Court of Appeals affirmed, with one judge dissenting, in reliance on *Bailey v. Richardson,* 182 F. 2d 46 (App. D. C., 1950), affirmed by an equally divided vote, 341 U. S. 918, 71 S. Ct. 669 (1951).

The Supreme Court reversed the judgment given below in the instant case. The Court decided that the petitioner was entitled to a declaratory judgment that his removal and debarment were invalid. The invalidity, according to a majority of the Court, lay in the Review Board's acting on its own motion without a referral of the case to it by either the employee or the agency board. The Presidential Order providing for the Loyalty Review Board conferred no authority upon the Review Board to proceed upon its own motion as it had done. Three of the justices of the Court dissented from this ground of the Court's holding.

In his concurring opinion, Mr. Justice Black questioned whether the Presidential Order establishing the loyalty program was authorized. Mr. Justice Douglas, concurring only in the Court's decision to reverse the judgment below, said (at pages 350-351):

> Dr. Peters was condemned by faceless informers, some of whom were not known even to the Board that condemned him. Some of these informers were not even under oath. None of them had to submit to cross-examination. None had to face Dr. Peters. So far as we or the Board know, they may be psychopaths or venal people, like Titus Oates, who revel in being informers. They may bear old grudges. Under cross-examination their stories might disappear like bubbles. Their whispered confidences might turn out to be yarns conceived by twisted minds or by people who, though sincere, have poor faculties of observation and memory.

Mr. Justice Douglas went on to add that in his opinion the decision of the Review Board deprived Dr. Peters of the liberty or right to work, in violation of the "due process" clause, and perhaps under the circumstances amounted to an unconstitutional equivalent of a bill of attainder.

Language similar to that of Mr. Justice Douglas was used in the majority opinion in *Parker v. Lester,* 227 F. 2d 708 (CA-9, 1955), which case decided that merchant seamen are entitled to "due process;" were not given it by the security-screening regulations applicable to them; and that the enforcement of the regulations should be enjoined. In that case, the Court of Appeals had no occasion to decide and did not purport to decide whether a government employee is entitled to "due process" before (a) he is branded as disloyal and (b) dismissed from employment. Assuming that the general right to work involved in *Parker v. Lester* does not include the specific liberty to work for the government, does the "due process" clause of the Fifth Amendment protect against the arbitrary and unreasonable imposition of the badge of infamy, the finding of disloyalty?

Although the Supreme Court had granted certiorari "because the case appeared to present the same constitutional question left unresolved" by the *Bailey* case, supra, the majority of the Court explicitly declined, in view of the alternative ground of decision available, to consider a constitutional issue. As matters stand, therefore, the constitutionality of a board's deciding an issue of employee loyalty according to the procedures followed by the Review Board in the *Peters* case remains to be cleared up. To express it differently, the Court of Appeals for the District of Columbia twice has held the Constitution gives no protection, but the Supreme Court has not spoken.

If the handiwork of the Founding Fathers does not save their descendants from the type of procedure described in the above-quoted language of Mr. Justice Douglas, there nevertheless appears to be nothing in the Constitution to forbid its present-day beneficiaries from devising procedures which provide the rudiments of a fair hearing to federal employees. To speak of the legality only, the eighteenth-century doctrine of "due process" embodied in the Fifth Amendment may be supplemented by a twentieth-century legislative or executive prescription of "fair process" involving an employee's right to confront and cross-examine any informants willing to be sworn and testify against him under such circumstances.

As for the judiciary, it is at least doubtful whether it should develop a doctrine of "fair process" if the coordinate branches of government fail to make such a prescription. In any event, on the basis of existing legal doctrines, there appears to be no authority for court relief against administrative judgments of disloyalty and dismissal which provide scant notice, have no support in evidence and permit no confrontation or which (about the same thing) are "based" on undisclosed or vaguely disclosed charges of faceless informers unless (a) there happens to be an irregularity in the administrative proceedings as in the *Peters* case or (b) the "due process" clause or other constitutional protection is available in the circumstances.

Beyond the ken of the courts and the scope of this note are certain questions of policy rather than law, such as: Is the fair treatment of public employees, whether in sensitive or non-sensitive positions, as consistent with the public safety and security as the determination of "loyalty" by methods such as employed by the Review Board in the *Peters* case? If not, can fair treatment of the individual employee (itself a public demand) be made reasonably consistent with such other, supposedly conflicting, public demands as safety and security?

COMMENT ON EDITORS

With the publication of the present issue of Dicta, the personnel of the Student Board of Editors and Staff of Dicta changes. The Editorial Board believes that great strides have been made during the past year to improve Dicta both in format and editorial content. A great share of the credit which is due for these advancements must be given to the following members of the retiring Board of Editors:

Managing Editor.....WILLIAM E. KENWORTHY
Article Editor.....SPIRO NICKOLAS
Student Work Editor.....RICHARD EASON
Business Manager.....JAMES F. CULVER
Associate Editors....JAMES HORTON & JOHN J. CONWAY
Staff: John Deisch, Melvin Coffee, Richard Zarlengo, Richard Bangert, John Bush, Robert Pierce.

To these extremely capable and talented individuals go the thanks of the Editorial Board and to the following individuals, constituting the new Student Board of Editors and Staff, go congratulations and hopes for an even better publication:

Managing Editor.....ROBERT PIERCE
Article Editor.....JOHN DEISCH
Student Work Editor.....RICHARD ZARLENGO
Business Manager.....MELVIN COFFEE
Associate Editors.....James Horton, John J. Conway, Richard Bangert, John Bush, Bill Kenworthy, Richard Eason, James Culver, Spiro Nickolas

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ARNOLD M. CHUTKOW
Denver Bar Association
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Colorado Bar Association
ROBERT DAVISON

NOTES AND COMMENTS

Colorado State Board of Examiners of Architects v. Rico[1]: *Equity Will Not Enjoin the Enforcement of an Unconstitutional Statute*

BY JOHN CORBRIDGE

John Corbridge: B. S. (Business), University of Colorado, 1950; LL. B. cum laude, University of Denver, 1956; admitted as a certified public accountant in Colorado, 1954; admitted to the Colorado bar, 1956; former President of the College of Law Board of Governors; member of Order of St. Ives; Phi Delta Phi and Omicron Delta Kappa.

The plaintiff in this case sought a declaratory judgment and an injunction prohibiting the Board from acting to interfere with his practice of architecture. As a basis for such relief, the plaintiff alleged that the licensing statute was unconstitutional. The judgment of the trial court granting the relief prayed for by the plaintiff was reversed by the Supreme Court. Justice Moore's opinion held that it was improper to grant injunctive relief against the enforcement of an unconstitutional statute.

This doctrine was first announced as the Colorado law in the case of *Denver v. Beede*.[2] The basis of the rule, then as now, is that equity will grant relief only where there is no plain, speedy and adquate relief at law. That doctrine is undisputed. The problem lies in its application and the definition of what will constitute a plain, speedy and adequate remedy at law.

The jurisdiction of equity would appear to be a matter of state law, even where it is alleged that a statute violates the Constitution of the United States. Still the instant case is squarely in conflict with the rule as announced in *Truax v. Raich* [3] by the Supreme Court of

1 .....Colo..... ; 289 P. 2nd 162 (1955). See also:
Olympic A. C. v. Speer, 29 Colo. 158.
Canon City v. Maning, 43 Colo. 144, 95 P. 537 (1908).
Brunstein v. City of Fort Collins, 53 Colo. 254, P. 119 (1912).
Farmers' Dairy League, Inc. v. City and County of Denver, 112 Colo. 399, 149 P. 2nd 370 (1944).
Walker v. Begole, 99 Colo. 471, 63 P. 2nd, 1224 (1937).
Denver v. Thrailkill, 112 Colo. 488, 244 P. 2nd 1074 (1952).
2 25 Colo. 172, 54 P. 624 (1898).
3 239 U. S. 33 (1915); see also Shields v. Utah Idaho Central Railroad Co., 305 U. S. 176 (1938).

the United States. This case was an action to enjoin the threatened enforcement of a state statute prohibiting the employment of more than a stated number of aliens. The plaintiff was an alien employee whose job was at stake. The reasoning of that opinion is applicable to the Colorado decision. Chief Justice Hughes wrote:

> "It is also settled that while a court of equity, generally speaking, has no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property. The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should be similarly entitled to protection in the absence of an adequate remedy at law."

It may be contended that the *Truax* case should be distinguished since it was the employer rather than the plaintiff-worker who was subject to prosecution on violation of the unconstitutional statute. The later United States Supreme Court decision in *Terrace v. Thompson*[4] settles any such contention. The Court specifically held in the *Terrace* case that defending a criminal prosecution is not a plain, speedy and adequate remedy at law.

Any discussion of this problem would be incomplete without mention, of the leading case of *Ex Parte Young*.[5] That decision enjoined the enforcement of a railroad rate violation of which would subject one to a penalty of a fine up to a maximum of $5,000.00. The Court held that when the penalties for disobedience of a statute of this nature are so severe as to intimidate one from resorting to the courts to test its validity, the statute in itself constitutes a deprivation of equal protection of the laws. This doctrine binds state courts since it rests upon the Fourteenth Amendment to the U. S. Constitution.

As a practical matter, the penalties imposed by the architectual act which was in force at the time of the *Rico* decision[6] were sufficiently large to preclude a test of the statute by criminal prosecution. Penalties were set at fines up to $200.00 per day.

That a defense of criminal prosecution is not a plain, speedy and adequate remedy at law is established by the *Terrace* case, at least for the federal courts. Under Chief Justice Holmes' decision in the *Truax* case, the right to pursue one's livelihood is a property right and equity should enjoin enforcement of a statute which unconstitutionally restricts such property right, even though the statute provides criminal punishment for violations. Further, this type of statute may well be a deprivation of equal protection under the doctrine of *Ex Parte Young*.

4 263 U. S. 107 (1923).
5 209 U. S. 123 (1908).
6 1953 C. R. S. 10-1-15.

Attorneys: Privilege of Taking Bar Examination Can Be Taken Away If Applicant Can't Satisfy Board of Bar Examiners of His Moral Qualities.

By BERNARD H. THORN

Bernard H. Thorn is a senior at the University of Denver College of Law. He received the B. S. in Law from the University of Denver in 1955. A member of Phi Delta Phi, he has also served on the College of Law Board of Governors.

The case of Rudolph Schware vs. Board of Bar Examiners of the State of New Mexico, which was recently decided in our neighboring jurisdiction, is one that seems bound to provide much controversy.[1] The petitioner applied to take the bar examination in February, 1954; his petition was denied and a rehearing was granted in July of the same year. At the conclusion of the second hearing it was agreed that the first opinion should stand.

The facts are very clearly stated in the opinion. It appeared that the applicant used several Italian aliases, which in light of the fact that he was a Jew seeking employment in a predominantly Italian industry does not shock one's conscience. The petitioner was planning to organize the Italian employees in the plant in which he had secured work into a labor organization, which in time he did. He also used an alias on a similar occasion in California when working at a shipyard there; when he was arrested along with two or three thousand others during a labor dispute he gave the police another alias for fear of losing his job.

In 1940 the applicant was arrested in Detroit, Michigan, for violating the Neutrality Act of 1918. He was recruiting troops to fight for the loyalists in the Spanish Civil War. This charge was nol-prossed. The applicant was arrested once again in Texas when he was driving a friend's car from Michigan to California. There were no charges filed against him and he continued on his way. One must be mindful of the fact that he has never been convicted of any crime.

An important point the Court treated with due concern was the applicant's former membership in the Communist Party. He belonged to the Young Communist League in his senior year of high school. In 1934 he joined the Communist Party and remained a member until 1937. He dropped out of the party for a short time, then returned, remaining until 1940. He quit the party, disillusioned with its aims and leadership.

The Court was apparently aware of the different connotation the Communist Party had in the 1930's when the applicant was a member, which, indeed, is far from the view we hold of the party today.

The Court noted a simple statement which the applicant enclosed in a letter to his new bride while on board a boat to the Pacific Theater of operation during the second World War:

1 I. Schware vs. Board of Bar Examiners, 60 N.M. 304, 291 P. 2d 607.

"Jim Crow is on a par with anti-semitism, anti-Catholicism, and anti-Communism. In a democracy one cannot discriminate against a minority."

In the same letter the applicant wrote that all "antis" are: ". . . most dangerous and stupid mistakes for Americans to make. They violate Christian ethics as well as all other ethical principles that recognize the brotherhood of man. To top it all off consider them immoral."

The Court, I presume, thought this language indicative of a failure to really repudiate the party or its ideology. This is a very logical conclusion taken without the knowledge that the petitioner was recently married and may have been trying to impress his bride with his philosophical attributes.

When applying to take the Bar examination the applicant was unable to give all of his addresses since he was sixteen, which were required on his application. It is doubtful if many people could remember all of their addresses over a twenty-four year period if they had moved as much as the applicant.

When in 1950 the petitioner enrolled in the law school of the University of New Mexico he discussed with the Dean his former affiliation with the Communist Party. The Dean and the petitioner both felt that his activities wouldn't be a great obstacle in his path since they had occurred many years previously.

The Court was aware of the petitioner's good repute among his fellow students. While going to law school he started an anonymous scholarship for needy law students. He received letters from teachers, fellow students and business associates attesting his good moral character when he sought admission to the bar. In affirming the Board of Bar Examiners' conclusion, the Court stated:

"We take no pleasure in the duty we have had to perform for no man is all good or all bad. The record on which this decision is based came from the petitioner himself who presently enjoys good repute among his teachers, his fellow students and associates and in his Synagogue. But our obligation to the Bar of this state knows no compromise. Petitioner has sought an office difficult to obtain and difficult to serve."

The cases are numerous, too, which hold that by asking admission into the legal profession an applicant places his good moral character directly in issue and bears the burden of proof as to that issue.[2]

The case of Re Wells, supra, brought out the fact that the conditions and burdens of proof are not the same for a disbarment procedure as they are for the admission to the bar.

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2 Spears v. State Bar, 211 Cal. 183, 294 p. 697, 72 ALR 923 (1930); In Re Wells, 174 Cal. 467, 163 p. 657 (1917); In re Weinstein, 150 Ore. 1, 42 Pac. 2d. 744.

The law seems to be well settled on the requirements for admission to the bar and we find the Court saying in a North Carolina case,[3]

> " 'This upright character' prescribed by the statute, as a condition precedent to the applicant's right to receive license to practice law in North Carolina, and of which he must, in addition to other requisites, satisfy the Court, includes all the elements necessary to make up such a character. It is something more than an absence of bad character. It is a good name which the applicant has acquired, through association with his fellows. It means that he must have conducted himself as a man of upright character ordinarily would, should or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing if it is right, and the resolve not to do the pleasant thing if it is wrong . . ."

The Court said the applicant had not convinced them that he was a man of good moral character such as that required for the holding of the office of attorney in the State of New Mexico. While some might, no doubt, feel that the applicant was denied due process by this decision, it has been established by a long list of cases that the right to practice law is not a constitutional one. We find the Court saying In Re Greer,[4]

> "The right to practice law is not a natural nor constitutional one in the sense that the right to engage in the ordinary avocations of life, such as farming, the industrial trades and the mercantile business. It has always been considered a privilege only, bestowed upon certain persons primarily for the benefit of society."

In a recent Florida case the Court said in dictum that while membership in the Communist Party was enough in itself to sustain a disbarment it was still incumbent upon the State to prove membership, and the mere invoking of the Fifth Amendment was not in itself evidence of membership.[5]

If membership in the party is in itself grounds for disbarment, then in the requirement for admission, where the slightest blur on one's character is sufficient to keep him from admission, merely previous membership might suffice to deny admission.

There is no doubt that loyalty to the Constitution is an inalienable condition to a lawyer's service as an officer of the Court. Communist Party membership is incompatible with this loyalty.[6]

It would seem in this case that even though one has led an impeccable existence for a number of years, it is still incumbent upon an applicant for the position of attorney in society to show an almost flawless character from the age of responsibility.

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3 In re Farmer, 191 N. C. 235, 131 S. E. 661.
4 In Re Greer, 52 Ariz. 385, 81 P. 2d 96; Re Lavin, 59 Idaho 191, 81 Pac. 2d 727.
5 Sheiner vs. State, 24 L.W. 1041, _____ S.E. _____.
6 In Re Anastapo, 3 Ill. 2d. 471, 121 N.E. 2d. 826.

OPINIONS OF THE ATTORNEY GENERAL

JURORS—FEES—SALARIES

55-2803—April 14, 1955

REQUESTED BY: William L. Gobin, Judge of the District Court 16th Judicial District

FACTS: The clerks of courts in the 16th Judicial District are in doubt as to the application of House Bill 36, passed by the 1955 General Assembly, approved by the Governor, and now in force, which provides in part as follows: Jurors shall receive, for attending any court of record, court commissioners or referee, the following fees, to wit: six dollars per day while actually engaged on the jury; three dollars per day for attendance on panel alone.

QUESTION: When shall the "jurors" receive $6.00 per day and when shall they receive $3.00 per day?

CONCLUSION: The "jurors" shall receive $6.00 per day only during the time between which they are sworn to try a case and the time when they are discharged from service in that case. At all other times while in attendance on panel they shall receive $3.00 per day.

SOIL CONSERVATION

55-2805—May 3, 1955

REQUESTED BY: Kenneth W. Chalmers, Secretary
Colorado State Soil Conservation Board

QUESTION: Can the board of supervisors of a soil conservation district by their official action exclude from the district those lands which have become devoted exclusively to (a) commercial uses, (b) industrial uses, and (c) domestic dwellings?

CONCLUSION: The board of supervisors of a soil conservation district, by official action on petition by landowners or of their own volition, may exclude lands devoted exclusively to commercial and industrial uses, subject, however, to the provision in 128-1-5 (5), '53 CRS, that no land shall be so excluded from a district unless and until all lawful taxes and other charge of the district against such lands shall have been paid. Lands devoted to residential use may not be so excluded.

COLORADO A & M COLLEGE

55-2771—January 20, 1955

REQUESTED BY: Joseph M. Whalley, Business Manager
Colorado A & M College

FACTS: During the operation of the School of Veterinary Medicine at Colorado A & M College, Fort Collins, Colorado, the clinic accepts animals for treatment from private citizens. During the course of treatment occasionally an animal will die, whereupon the animal's owner will seek damages from the college for the loss of the animal. Students and college officials participate in the course of treatment.

QUESTION: Is the college liable in damages for the death of an animal which died while undergoing treatment at the college?

CONCLUSION: The college would not be liable for damages for the death of an animal while under treatment at the veterinary college.

LIQUORS

55-2775—February 3, 1955

REQUESTED BY: George J. Baker, Secretary of State

FACTS: Mr. A has applied for a transfer of hotel and restaurant liquor license from No. 1215 Twentieth Street to No. 2800 Downing Street, both within the City and County of Denver. The institution known as Juvenile Hall is located at 2844 Downing Street. The Denver Public Schools maintain two regularly qualified teachers at Juvenile Hall. Regular classes are held there.

QUESTION: Is the institution within the City and County of Denver known as Juvenile Hall a public school within the prohibition contained in 75-2-12 (9) Colorado Revised Statutes 1953, which provides that no license shall be issued to or held by any person who will operate any place where liquor is sold or to be sold by the drink within five hundred feet from any public or parochial school, college, university, or seminary?

CONCLUSION: The institution within the City and County of Denver known as Juvenile Hall is not a "public

school" within the meaning of 75-2-12 (9) Colorado Revised Statutes 1953, and is not one of the other educational institutions therein named.

DEPT. OF HIGHWAYS

55-2780—February 16, 1955

REQUESTED BY: Mark U. Watrous, Chief Engineer
Department of Highways

FACTS: The Department of Highways proposes to adopt certain changes in the Manual on Uniform Traffic Control Devices, most significant changes being the change-over from black-on-yellow stop signs to white-on-red stop signs, and the adoption of a new sign called "YIELD RIGHT OF WAY."

QUESTIONS:
1. Does the present State law permit the change-over from black-on-yellow signs to the white-on-red stop signs?
2. While replacing the old signs, would a dual operating standard be required pending completion of the conversion?
3. Would special legislation be required to give the "YIELD RIGHT OF WAY" sign lawful authority and meaning?
4. What procedure should be observed for effecting appropriate revision of the Manual beyond consideration and approval of the State Highway Commission?

CONCLUSIONS:
1. The Department of Highways may change the signs from black-on-yellow to white-on-red under the present Colorado law.
2. There should be a dual operating standard set out in the Manual during the conversion.
3. Special legislation would be required to

give the "YIELD RIGHT OF WAY" sign enforcible authority and meaning.
4. The procedure to be observed and effecting the revision of the Manual is within the discretion of the State Highway Commission. However, this Manual should correlate so far as possible with the current system approved by the American Association of State Highway Officials.

TAXATION—COUNTY ASSESSOR

55-2788—March 10, 1955

REQUESTED BY: J. R. Seaman, Chairman
Colorado Tax Commission

FACTS: Following the regular sessions provided for by the Constitution and by statute of the County and the State Boards of Equalization, and without reference to orders issued by such bodies, the Assessor of Weld County increased the assessment on all irrigated lands within his jurisdiction by 25%. Several owners of such lands filed petitions asking for an abatement of taxes so increased.

QUESTION: May the Board of County Commissioners acting as a County Board of Equalization and the Tax Commission legally take action on the petitions so filed?

CONCLUSION: A taxpayer may not be denied administrative remedies to correct assessments where such assessments are made after cessation of the regular sessions of the County and State Boards of Equalization. Such administrative remedies are for the benefit of the taxpayer who cannot without fault on his part be deprived of a right to be heard.

FLASH – A RECENT DEVELOPMENT IN G. I. LOAN FORECLOSURE PRACTICE

By Royal C. Rubright

The Subcommittee on District Court Forms of the Forms Standardization Committee of the Colorado Bar Association published in 31 Dicta, page 379, October 1954, a Checklist for Foreclosure Proceedings Involving Loans Insured Or Guaranteed By The Federal Housing Administration or the Veterans Administration. That article assumed that the regular statutory Public Trustee foreclosure could be conducted.

All too often, unfortunately, the title to the premises being foreclosed is encumbered by a Federal tax lien, usually an income tax lien. Under these circumstances, a Public Trustee foreclosure is not sufficient because it does not confer proper jurisdiction over the United States to establish priority of the deed of trust over the tax lien. Lawyers have in the past found it necessary to bring a court foreclosure and to obtain jurisdiction over the United States by complying with 28 U.S.C. Section 2410. As we all know, a court foreclosure is more difficult and more time consuming and lawyers generally would much prefer to foreclose through the Public Trustee.

Interestingly enough, the Veterans Administration has now established a system by which, if title is acquired by them, they can negotiate with the other branch of the Government holding the tax lien and obtain a release.

We are informed that the Veterans Administration will in many cases approve, I might almost say would prefer, a Public Trustee foreclosure even though a Federal tax lien is of record. The most important step to take is to contact the Loan Guaranty Division of the Veterans Administration *before* you begin foreclosure of a loan which is insured or guaranteed by the Veterans Administration if you know that a Federal tax lien is recorded against the property as a junior encumbrance. There are excellent chances that the Veterans Administration will approve a Public Trustee foreclosure instead of a court foreclosure under these circumstances.

We are all conscious of the fact that the attorneys fees allowed by the Veterans Administration are much less than those prescribed by the Minimum Fee Schedule adopted by the Denver Bar Association. The ability to conduct a public trustee foreclosure should minimize the loss which attorneys suffer from such foreclosures.